No. 78-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL REPLY OF PETITIONER

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TABLE OF AUTHORITIES

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This supplemental reply is filed by AT&T in response to the memorandum filed by the Department of Justice. The Department concedes that "petitioners' contentions are not without some force" (Dep't Br. 11) but nevertheless opposes certiorari. The Department's tempered opposition, however, does not follow logically from its own analysis of the issues. On the contrary, that analysis actually reinforces the need for certiorari in this case.

1. The Solicitor General agrees that Section 201 of the Communications Act requires interconnection or-

ders to be based on FCC public interest findings. Dep't Br. 11. The United States also does not dispute that the court below could not properly have made these findings. Rather, the Department of Justice attempts to defend the interconnection order entered by the District of Columbia Circuit by contending that it is based on that court's interpretation of prior FCC public interest findings. *Id.* at 11-12.

The attempt fails for at least two reasons. First, the Solicitor General omits to mention that the FCC has consistently stated that it never made the public interest findings now attributed to it;[1] and the Department of Justice ignores the authorities of this Court that entitle this agency interpretation of its own prior language to controlling weight. *E.g., Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965), and cases cited at AT&T Pet. 13 n.19. Second, the lower court itself has found that the FCC never made any public interest determinations concerning the desirability of competition among switched public message services like Execunet.[2] 561 F.2d at 378, 380 (Pet. App. 25i, 30i). In short, the necessary public interest findings—which the United States acknowledges must be made by the FCC—can only have been supplied improperly by the lower court.

Equally revealing are the Solicitor General's admissions that interconnection under Section 201 and carrier authorization under Section 214 are separate questions and that the lower court's order therefore necessarily requires construction of the FCC's interconnec-

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[1] *E.g.*, MO&O paras. 60-61 (Pet. App. 36c-37c); FCC Pet. 3.

[2] Indeed, the Solicitor General correctly observes that the FCC has just now begun a proceeding to examine and decide the matter. Dep't Br. 14.

tion orders in *Bell System Tariff Offerings*. Dep't Br. 11. Yet by the lower court's own concession, the matter of interconnection was not "addressed explicitly" in the *Execunet* case (slip op. 11 (Pet. App. 10a-11a)). Under the rule in *Perkins* that failure to make "explicit mention" of an issue leaves the matter open for consideration on remand,[3] interconnection cannot have been required by the *Execunet* mandate. The lower court's interconnection directive must therefore violate both the well-settled rules on mandate construction and the *Pottsville* prohibition against judicial exercise of administrative functions.

2. Additionally, the Solicitor General's assertion that the lower court's order does not conflict with the Third Circuit's *Bell of Pennsylvania* mandate is in error. Recognizing that "[t]he Third Circuit's opinion refers only to 'private line services,'" the Solicitor General nevertheless argues that the Commission has expanded this concept to include other "specialized services." Dep't Br. 13. However, the Commission has also made it clear that the term "specialized services" *excludes* ordinary long distance telephone service like Execunet (MO&O para. 59 (Pet. App. 34c-35c)).[4]

At any rate, it is what the Third Circuit held to be the extent of AT&T's interconnection obligation that is controlling for conflict purposes. The United States agrees that the precise scope of the FCC's orders in *Bell System Tariff Offerings* was at issue in *Bell of*

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[3] *Perkins* v. *Standard Oil Co.*, 399 U.S. 222, 223 (1970).

[4] The United States does not appear to disagree that the private line concept cannot rationally be construed to cover Execunet, which the FCC has found to be the very antithesis of private line service. 60 F.C.C.2d at 42, 59-62. See AT&T Pet. 21.

Pennsylvania, and does not deny its own prior representations (see MO&O para. 48 (Pet. App. 28c-29c)) —which the Third Circuit adopted—that the interconnection orders were limited to private line services. Dep't Br. 12-13.[5] In the absence of public interest findings, which clearly have not yet been made, any FCC interconnection order for services other than private line would violate the Third Circuit's mandate. By requiring the FCC to enter just such an order, the lower court has invaded the Third Circuit's exclusive jurisdiction under the Hobbs Act.

3. The Solicitor General's claim that this case is unimportant rests on the premise that the lower court did nothing more than interpret the FCC's previous interconnection orders. As we have shown, that premise is incorrect: the lower court had to supply public interest findings never made by the Commission or ignore the requirement for such findings; and it had to disregard a limiting construction of the same interconnection order adopted by the Third Circuit pursuant to its "exclusive jurisdiction." See pp. 2-4, above; FCC Pet. 29-32; AT&T Pet. 12-17; AT&T Reply 2-7.

Beyond this, the Solicitor General completely ignores a fundamental issue which by itself makes review essential in this case. By suggesting that the FCC eventually might conclude that the lower court's communications policy lacked a factual or public interest basis (Dep't Br. 14), the Department of Justice sanctions if not encourages the lower court's reversal of the roles

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[5] The Solicitor General's current reading of *Bell of Pennsylvania* makes the interconnection obligation virtually open-ended. Dep't Br. 11-12. Assuming this is the reading adopted by the D.C. Circuit, it is precisely contrary to the limiting construction adopted by the Third Circuit, at the urging of the United States.

established by the Congress and this Court for appellate courts and administrative agencies. To deny review in this case would excuse judicial usurpation of agency authority on the ground that agencies can institute proceedings to prove their reviewing courts wrong.[6] Few matters could be more important to the proper relationship of administrative agencies and lower appellate courts than the restoration of the FCC's mandated power in this case.[7]

Finally, the importance of this case is emphasized by the United States' previous position on the petitions for certiorari in *Execunet*. There, this Court was presented with a conventional issue of statutory construction that eventuated in a remand. Even so, the United States supported the grant of certiorari.[8] Here, in contrast, the lower court has gone far beyond matters of statutory interpretation and has jeopardized this Court's line of decisions from *Pottsville* to *Vermont Yankee* and threatened to undermine the Hobbs Act's allocation of judicial power. The issues involved in this case are important, recurring, and appropriate for review by this Court.

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[6] The Department of Justice position also fails to account for the overwhelming adverse if not irreparable impact of the lower court's action. By all responsible estimates, the Commission's inquiry into the appropriate market structure for switched public message services apparently is destined to continue for a very long time. In other words, absent certiorari in this case, the nation's public telecommunications network will for the foreseeable future be structured as the District of Columbia Circuit—not the FCC—has decided.

[7] The additional question of the Third Circuit's "exclusive jurisdiction," which the Solicitor General also ignores, is another independent basis for certiorari.

[8] Memorandum for the United States, *USITA* v. *MCI Telecommunications Corp.*, Sup. Ct. Nos. 77-420, *et al.*, November, 1977.

CONCLUSION

For the reasons stated above and in AT&T's petition and reply, certiorari should be granted.

Respectfully submitted,

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